UNITED NATIONS

TD

United Nations Conference on Trade and Development

GENERAL

TD/B/COM.2/17
TD/B/COM.2/EM.5/3
6 May 1999

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology and Related Financial Issues

REPORT OF THE EXPERT MEETING ON INTERNATIONAL INVESTMENT AGREEMENTS: CONCEPTS ALLOWING FOR A CERTAIN FLEXIBILITY IN THE INTEREST OF PROMOTING GROWTH AND DEVELOPMENT

Held at the Palais des Nations, Geneva, from 24 to 26 March 1999

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GE.99-51638

I. AGREED CONCLUSIONS [1]

1. The Expert Meeting reviewed the ways and means by which existing international investment agreements (IIAs) provide for flexibility for the purpose of promoting growth and development and discussed pertinent experiences, including various concepts applied at different levels of IIAs. It noted that flexibility, including with regard to a Government's normal ability to regulate, can be reflected, *inter alia*, in the objectives, content, implementation and structure of IIAs. It also noted that a key issue involves finding the proper balance between flexibility on the one hand and predictability and security on the other. The Expert Meeting noted the role that IIAs can play as one of the factors contributing to confidence-building in investment relations.

2. The Expert Meeting observed in this connection that the three expert meetings convened by the Commission on the development dimension of IIAs have assisted in clarifying some of the concepts and mechanisms available for IIAs so as to be responsive to development concerns, first by looking at bilateral investment agreements and their development dimension and implications for a possible multilateral framework on investment,[2] then by examining regional and multilateral investment agreements from the same perspective,[3] and finally - building on the work of the preceding expert meetings - by discussing ways in which flexibility with respect to development concerns can be given effect in IIAs.

3. The Expert Meeting also observed that, given the complex issue of flexibility in IIAs, there is a need for more work to shed further light on the interrelationships between IIAs and the promotion of growth and development.

4. In this context, the Expert Meeting noted favourably the work carried out by UNCTAD in the framework of its programme on a possible multilateral framework on investment, in particular as regards capacity-building, including through training, seminars and the like. It welcomed the integrated nature of this programme, as it combines policy analysis (as exemplified in the *IIA Issues* Papers[4]), technical cooperation and consensus-building. It also recognized the usefulness of informal discussions aimed at dialogue and consensus-building on matters concerning IIAs and their development dimension.

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[1] As adopted by the Expert Meeting at its closing plenary meeting on 26 March 1999.

[2] See "Report of the Expert Meeting on Bilateral Investment Agreements and their Development Dimension", TD/B/COM.2/5-TD/B/COM.2/EM.1/3.

[3] See "Report of the Expert Meeting on Existing Regional and Multilateral Investment Agreements and their Development Dimension", TD/B/COM.2/11-TD/B/COM.2/EM.3./3.

[4] *Foreign direct investment and development* (Sales No. E.98.II.D.15); *Scope and definition* (Sales No. E.99.II.D.9); *Admission and establishment* (Sales No.E.99.II.D.10); *Investment-related trade measures (IRTMs)* (Sales No. E.99.II.D.12); *Most-favoured-nation treatment* (Sales No. E.99.II.D.11); and *Transfer pricing* (Sales No. E.99.II.D.8).

5. The Expert Meeting recommended that the report[2/] submitted by the secretariat should be revised in light of the discussions during the Expert Meeting. The revised paper should be submitted to the next session of the Commission, with a view to informing it about the issues involved and policy options.

[2/] See "International investment agreements and concepts allowing for flexibility in the interest of promoting growth and development", TD/B/COM.2/EM.5/2.

II. CHAIRPERSON'S SUMMARY

1. In his opening address, the Secretary-General of UNCTAD affirmed that flexibility is at the heart of the debate on negotiations of international investment agreements (IIAs) at the multilateral and regional levels. He noted that, although the flexibility debate in turn focuses on development, it actually leads to the broader question of the powers of the nation-State in the face of the transnational nature of corporations and, of course, the question of the growing role of civil society in the international debate. The recent negotiations on a multilateral investment agreement (MAI) in the OECD have shown there are important differences even among developed countries regarding investment rules and in areas which do not necessarily reflect North-South concerns but broader concerns of all countries about international investment rule-making. In this context, he observed that the present pace of rapid change in investment relations makes it difficult to pursue efforts towards codifying international investment law. Such codification needs to take place when there is certainty and reasonable agreement by the majority of countries about the content and nature of the rules. Therefore, in his view, the drafting of investment rules in times of change must reflect a sense of flexibility in order to allow for possible different outcomes. This is not only because, as demonstrated by the MAI negotiations, there has been a lack of consensus in this area, but also because the empirical evidence about the impact of foreign investment on development is at times inconclusive. The Secretary-General asked the expert meeting to consider what developing countries expect to get out of IIAs. In his view, they expect two basic things: more greenfield investment to generate technology, finance and access to markets, and more flexibility to deal with foreign investment, because it is such a complex phenomenon and no one can foresee what kind of policies may be needed to deal with it in unforeseen circumstances. In this respect, he noted that three recent international trade initiatives - the Uruguay Round of Multilateral Trade Negotiations (particularly in relation to trade-related investment measures and subsidies), the IMF initiative in pursuing its recent mandate to amend the Articles of Agreement, and the OECD MAI, seeking high standards of treatment and liberalization for FDI flows - sought to impose limits on flexibility in national policy-making. One should ask what the purposes are of such limitations and whether these proposals would lead to the realization of sought after objectives. Finally, he suggested that one possible method of organizing the discussions of the Expert Meeting could be to start by agreeing on what types of limitations to national policy flexibility are already accepted and then to consider in what other areas these limitations should also apply.

2. The Chief of the International Investment, Transnationals and Technology Flows Branch, introducing the discussion on agenda item 3, "Concepts - such as exceptions and other mechanisms - allowing for a certain flexibility, including in the field of technological capacity-building, in the interest of promoting growth and development - to allow countries in different stages of development to benefit from international investment agreements", drew attention to the impressive investment treaty-making activity that has taken place during the 1990s at all levels. It was precisely because of the demands of this treaty-making activity that the Commission and its expert meetings were paying attention to this matter. After explaining the rationale and objectives of the Expert Meeting, he observed that, as growth and development are the ultimate goals of IIAs, the challenge facing countries is how to ensure that such agreements

adequately serve the development needs of developing countries. Often the question becomes one of what are the means by which IIAs can provide the flexibility needed by developing countries to pursue development policies in light of their specific circumstances. He outlined the Note prepared by the secretariat (TD/B/COM.2/EM.5/2), which aims at providing examples of ways and means by which flexibility in existing IIAs have been given expression, and suggested that during the discussions experts should point out other ways and means that are also relevant in this context. Finally, he noted that finding the proper balance between obligations and flexibility is indeed a difficult challenge, and the Meeting provided an opportunity to contribute to a better understanding of how this challenge can be met.

3. In his closing summary, the Chairperson commended experts and participants for a successful meeting. He said that participation in the open discussions was extensive and that the debate was informative and insightful. The Chairperson emphasized that the revised secretariat paper will further elucidate the concept of flexibility, in particular as it reflects the development dimension. He noted that IIAs address the rights and responsibilities of the signatories and that it is important to provide for an appropriate balance between the two. He also noted the importance of transparency with respect to the rules and practices of international investments and said that IIAs address issues related to existing economic and information asymmetries, including through technical assistance provisions. Finally, he emphasized the importance of other positive elements, such as financial packages and technical assistance clauses, which may be included in IIAs so as to address existing asymmetries.

4. The discussions of the Expert Meeting on agenda item 3 on were structured around the following themes:

- Objectives and substantive provisions;
- Modalities of implementation; and
- Overall structure.

5. The session began with a panel discussion on **"How to ensure that international investment agreements are sufficiently flexible to serve adequately development needs, in addition to the specific objectives of each instrument".** Ms. Magda Shahin of the Ministry of Foreign Affairs of Egypt, speaking on the experience with the General Agreement on Trade in Services (GATS), said that the GATS is one of the Uruguay Round Agreements in which the development dimension was not simply paid lip service, but in which developing countries succeeded in making the development objective an integral part of the Agreement. This objective was clearly spelled out in the preamble to the Agreement, which also called for particular attention to be given to the developing countries, recognizing the asymmetries existing with respect to their degree of development. Even more important, the GATS was structured accordingly. Its overall structure, dividing obligations into specific and general commitments, is such as to allow countries to undertake commitments commensurate with their level of development. Unlike trade in goods, specific commitments on market access and national treatment are negotiated and not acquired rights and obligations. The underlying principle of negotiations in the GATS, as in all the Uruguay Round Agreements, is that of reciprocity. Nevertheless, the elements of flexibility introduced in the Agreement allowed countries to open fewer sectors and liberalize fewer types

of transaction. Implementation, however, has revealed a number of weaknesses, which have resulted among others in the liberalization of more sectors of interest to developed countries. The GATS also provides for priority access to technical cooperation and information distribution channels and was the first WTO agreement to link business practices and competition, although the relevant provision still needs to be expanded upon. Overall, however, developing countries should be more aware of their rights in the GATS and make more and better use of the flexibility mechanisms available to them.

6. Prof. Jean-Luc Le Bideau of the University of Paris summarized the flexibility features of the Lomé Convention, explaining that through the Convention the European Union undertook to help the African, Caribbean and Pacific (ACP) countries to improve their investment climate in order to foster economic growth and sustainable development, especially through the implementation of economic reforms, the improvement of investment laws and the development of financial services with a view to attracting private investment. Measures to promote investment flows to ACP countries include information regarding investment possibilities, legal guarantees and insurance mechanisms. To strengthen its contribution to development, a new Lomé Convention has been proposed to enhance investment and trade relationships between the European Union and the countries concerned. The proposed Convention would be built on the following main pillars: the creation of free trade zones, building on existing regional groups to facilitate the liberalization process, and the granting of special and differential treatment for the least developed ACP countries to facilitate their integration into the multilateral trading system, reinforce their institutional capacity and create a favourable policy framework to attract foreign investment and develop a dynamic private sector. For that purpose, the Convention would provide two instruments of development cooperation - a grant facility to support constructive development, and an investment facility to promote commercially viable enterprises, primarily in the private sector. The ongoing negotiations demonstrated a strong convergence of views between the European Union and the ACP countries on this subject.

7. Mr. Philippe Campoaré of the Ministry of Trade and Finance of Burkina Faso elaborated on these points and emphasized that the Lomé provisions on the protection and promotion of investments are broad principles which do not constrain the development policies of ACP countries. In addition, there are built-in consultation mechanisms which facilitate the Convention's application. Speaking on the impact of the Lomé Convention on development in Burkina Faso, he noted that the improvement of the investment environment through the Lomé process, notably by financing infrastructure, improving the legal, fiscal and investment regimes and the judicial system, and developing a code for regional integration, had contributed to attracting foreign investment in all sectors.

8. Mr. Sheldon McDonald of the Attorney-General's Department of Jamaica, speaking on his country's experience with flexibility in bilateral investment treaties (BITs), said that Jamaica approached BITs pragmatically. Policy changes in the late 1980s and multilateral and regional commitments on trade and investment disciplines have also influenced Jamaica's BITs. A margin of flexibility is provided in the BITs negotiated with both developed and developing countries, and from a capital-importing and capital-exporting perspective. Of paramount consideration has been the attempt to avoid BITs interfering with the Caribbean Community (CARICOM) Agreement, so as to ensure harmonious regional development. An important consideration in negotiating exceptions to national

treatment with major home countries has been to ensure that they do not act as a disincentive to foreign investors, while protecting actual and future Jamaican outward investments. It might consider a unilateral grant of national treatment, depending on the view taken of the strategic importance of the BIT partner. In a recent BIT negotiated under the auspices of UNCTAD and the Group of 15, the legal device of a protocol on national treatment was used.

9. During the ensuing discussion, the flexibility attributes of the GATS were further elaborated upon, as were those of OECD instruments, notably the Code of Liberalization of Capital Movements. It was observed that the concept of flexibility was not new to the OECD, where it had been a core functional principle for many years, given expression in the OECD approach to gradual liberalization. Flexibility in the OECD is considered a means to an end - namely, growth, development and deeper economic integration. In this respect, the OECD experience had been a success and had been monitored through a review mechanism to ensure that the liberalization process went ahead.

10. In the discussions during the rest of the meeting there was an attempt to clarify the **meaning and nature of the concept of flexibility** in relation to IIAs. Participants noted that in the present context, flexibility implied the notion of promoting development and applied to all investment agreements. However, it might have different functions when applied to BITs from those used in regional and multilateral agreements. For example, in the case of BITs it might be relevant in the sense of "negotiating flexibility", primarily because of the instruments' uniformity of content. The subject could also be approached by looking at different kinds of flexibility, or flexibility for different types of issues. Some experts suggested that in order to address the concept of flexibility, it was first necessary to define both development and "sustainable development", which was a different notion from simple growth. Others observed that, in order to avoid connotations of arbitrariness and excessive discretion, flexibility needed to be associated with other fundamental concepts, such as transparency, stability and predictability of national regulation. It was stressed that agreements were about striking a balance between the interests and concerns of countries and between the elements of a particular agreement. However, not all possible future developments could be foreseen. The issue, therefore, was not so much whether IIAs should provide for flexibility, but rather how much flexibility was consistent with the aims and functions of such agreements. In other words, there was a need to balance flexibility and commitments. There was broad consensus that the Expert Meeting had not yet come to grips with all the dimensions of the subject of flexibility in IIAs and further work needed to be undertaken, although it should be recognized that there might always be differences of opinion on this issue.

11. With respect to flexibility in the **objectives** of IIAs, experts stressed at the outset that flexibility must have development as its purpose. A key issue in this regard was what Governments should do to ensure that flexibility leads to concrete results in the achievement of their development objectives. To that end, it should be directly related to the various development needs and objectives of developing countries, which differ sharply from country to country depending on the relevant areas, sectors, activities and regions. It was recognized that a paramount objective of investment agreements is to promote investment flows as a means of obtaining technology, capital and access to markets. However, it must also be borne in mind that foreign investors will not invest in countries unless they offer a predictable, stable and transparent

investment climate. The question of how much protection and how much flexibility is needed to achieve the desired objectives also varies from country to country, depending on their underlying economic conditions. However, experts stressed that flexibility alone is not enough to achieve development but is a means to an end. Therefore, to achieve their development objectives, countries need to formulate their own development strategies to ensure an optimum use of flexibility in the interest of development. It was also suggested that in today's globalized economy, such policies need to give due consideration to the influence of outside factors and economic forces on development. The competitive pressures brought to bear by foreign investors could indeed stimulate local companies to become more competitive.

12. Regarding the question of flexibility in relation to the **substantive provisions** of investment agreements, experts suggested that one way to approach the topic was to try to identify the various contexts and types of issues for which flexibility is relevant. In this respect two broad perspectives could be considered. First, flexibility could be understood in the sense of allowing the host country additional possibilities for promoting its development. This perspective applies primarily to admission rules, performance requirements and rules on the treatment of foreign firms. In another sense, flexibility could be understood as a means to protect the right to regulate - that is, as a means for not excessively restricting the Government's powers to regulate, for example, in the areas of environmental protection, public health and social standards. As to the protection of foreign property from expropriation, one possible consequence of a broad understanding of the notion of the seizure of property might be that the State's regulatory powers could become subject to third-party international arbitration. Also regarding the settlement of investment disputes, experts suggested that some flexible means of resolving such disputes that have worked well, such as the OECD system of consultation and peer pressure, should be explored further. In fact, in many respects the issue of flexibility was as relevant for developed countries as for developing countries, as the multilateral agreement on investment (MAI) negotiations had demonstrated. Some experts related the concept of flexibility to the need for a balance of the rights and obligations of both countries and investors. In this respect, it was noted that IIAs were not a zero sum game of total liberalization or total protection; the reality was much more subtle. A new agenda on flexibility issues could include such issues as good governmental practices - for example, in environmental protection and labour standards aimed at establishing a "level playing field". Incentives disciplines are another area where international cooperation might be needed, as is the question of competition and restrictive business practices. In a global context, the issue of extraterritoriality should be addressed in order to avoid a mismatch between the global operations of transnational corporations (TNCs) and national policy. Finally, there was the social dimension. As civil society mobilizes to introduce codes on social responsibility, such codes might constitute topics for examination.

13. A number of experts described their countries' experiences in dealing with flexibility in investment rules. Some countries had traditionally relied on their national policies to provide a favourable investment climate. Through unilateral actions they had introduced gradual liberalization and protection standards at their own pace and in accordance with their own needs. Other countries had relied on international agreements to provide legal protection for foreign investment because they felt it was necessary for attracting investment. However, they also felt a need to provide for flexibility in order to attract

investment in certain areas and with certain development attributes. Others noted that although they had signed many investment agreements, these were not substantially relied upon as a tool in the attainment of social and economic development, but only as a means of reassuring investors of a predictable operating investment environment. Still others felt that some investors had moved to their countries because they could circumvent regulations.

14. The **modalities of implementation** of IIAs varied considerably depending on whether the agreement was bilateral, sectoral, multilateral or other, experts said. Moreover, the texts of the agreements did not always make all possibilities clear. Regarding country experiences with implementation mechanisms, it was noted that, despite the importance and complexity of investment relations and the large number of investment agreements in force, there seemed to be few problems with implementation, judging at least from the relatively few international arbitration cases involving investment disputes. However, implementation problems did sometimes arise, in particular over the exercise of regulatory powers by subnational authorities and de facto discriminatory treatment of foreign investors. Development-friendly implementation mechanisms could involve the resolution of information asymmetries through information-sharing clauses and priority access to information channels. In relation to economic asymmetries, some experts felt that the inclusion of exceptions to general principles had served the purpose of allowing for policy flexibility with respect to non-negotiable policy issues, while maintaining the commitment to the basic principles of the agreement, especially regarding pre- and post-admission national treatment. In other cases, "best efforts" commitments had served the same purpose in, for example, the Asia-Pacific Economic Cooperation (APEC) countries. Transitional implementation periods were another way of resolving development concerns related to implementation, which were to be found in many agreements. Another increasingly common approach to development-friendly implementation was the provision of promotional measures to attract foreign investment, and technical assistance to enhance the capacity of developing countries and assist them in meeting their commitments. In all these cases, performance monitoring was crucial for ensuring that the agreement was producing its expected outcome, and if not, determining what could be done about it. Monitoring mechanisms had often served to resolve implementation difficulties, and in this respect it was essential to maintain a cooperative attitude and explore the flexible options available.

15. Finally, a number of speakers stressed that development considerations should provide the orientation for the **overall structure** of IIAs. The structure of an investment agreement must be realistic, take into account the concerns of all actors participating in the investment and development process, and provide a coherent set of interrelationships between all the elements of the agreement, so that agreements are not just a listing of issues. To achieve sustainable and balanced objectives the structure of an investment agreement must be able to respond to the diversity and heterogeneity of developing countries and take into account macroeconomic factors and the need to preserve a policy space that will enable policy makers to implement their development strategies. The importance of incorporating competition issues to ensure access to markets by national firms through international networks was also stressed. All parties to an investment agreement look for flexibility. Hence, the structure of an agreement must be clear about the interactions and balance of interests between all parties. Some structural elements of flexibility discussed include the positive and negative lists approach and the built-in agenda approach, each having its own advantages

and disadvantages. One significant advantage of the positive list approach for developing countries that is not always emphasized is its simplicity, which makes it easier to handle than the negative list. Negative lists often include the possibility of phasing out exceptions.

16. In conclusion, many investment agreements were found to include ways of providing for flexibility in the interest of economic and social development. Whether and how such flexibility had worked out in the interest of development in practice was more difficult to ascertain, though there were concrete examples of direct positive effects. There was a sense that the potential for unravelling the possibilities of flexible mechanisms to ensure maximum benefits and minimum negative effects from IIAs for all parties has not yet been tapped.

III. ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

1. In accordance with the recommendation made by the Commission on Investment, Technology and Related Financial Issues at the closing meeting of its second session on 3 October 1997,[1/] the Expert Meeting on International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development was held at the Palais des Nations, Geneva, from 24 to 26 March 1999. The meeting was opened on 24 March 1999 by Mr. Rubens Ricupero, Secretary-General of UNCTAD.

B. Election of officers

(Agenda item 1)

2. At its opening meeting, the Expert Meeting elected the following officers to serve on its Bureau:

Chairman:	Mr. Jean-Luc Le Bideau (France)
Vice-Chairman-cum-Rapporteur:	Mr. Mussie Delelegn (Ethiopia)

C. Adoption of the agenda

(Agenda item 2)

3. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in TD/B/COM.2/EM.5/1. Accordingly, the agenda for the Meeting was as follows:

1. Election of officers

2. Adoption of the agenda

3. Concepts - such as exceptions and other mechanisms - allowing for a certain flexibility, including in the field of technological capacity-building, in the interest of promoting growth and development - to allow countries in different stages of development to benefit from international investment agreements

4. Adoption of the report

[1/] See Report of the Commission on Investment, Technology and Related Financial Issues on its second session (TD/B/44/14-TD/B/COM.2/7), paragraph 51.

D. Documentation

4. For its consideration of the substantive agenda item (item 3), the Expert Meeting had before it a report by the UNCTAD secretariat entitled "International investment agreements: concepts allowing for flexibility in the interest of promoting growth and development" (TD/B/COM.2/EM.5/2).

E. Adoption of the report

(Agenda item 4)

5. At its closing meeting, on 26 March 1999, the Expert Meeting adopted the agreed conclusions reproduced in section I above, and authorized the Chairperson to prepare a summary of the Meeting (see section II above).

ANNEX

ATTENDANCE */

1. Experts from the following States members of UNCTAD, attended the meeting:

Argentina
Australia
Austria
Bangladesh
Belarus
Benin
Bolivia
Brazil
Brunei Darussalam
Bulgaria
Cameroon
Canada
Chile
China
Colombia
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Czech Republic
Democratic People's Republic of Korea
Egypt
El Salvador
Estonia
Ethiopia
Finland
France
Georgia
Germany
Guatemala
Haiti
India
Iran (Islamic Republic of)
Italy
Jamaica
Japan
Kenya
Latvia
Madagascar
Malaysia
Mali
Mauritius
Mexico
Morocco
Nepal
Netherlands
Norway
Pakistan
Paraguay
Peru
Philippines
Poland
Republic of Korea
Russian Federation
Saudi Arabia
Senegal
Singapore
Slovakia
Spain
Sri Lanka
Sudan
Sweden
Switzerland
Syrian Arab Republic
Thailand
Trinidad and Tobago
Tunisia
Turkey
Ukraine
United Kingdom of Great Britain and Northern Ireland
United States of America
Venezuela
Yemen
Zambia
Zimbabwe

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*/ For the list of participants, see TD/B/COM.2/EM.5/INF.1.

2. The following intergovernmental organizations were represented at the meeting:

African, Caribbean and Pacific Group of States
Arab Labour Organization
European Community
League of Arab States
Organisation for Economic Co-operation and Development
Organization of African Unity

3. The following specialized agencies and related organization were represented at the meeting:

World Health Organization
International Monetary Fund
World Trade Organization

4. The following non-governmental organizations were represented at the meeting:

General Category

International Confederation of Free Trade Unions
International Chamber of Commerce
Women's International League for Peace and Freedom
World Federation of United Nations Associations

Panellists, Resource Persons and Specially Invited Participants

Panellists

Mr. Philippe Campaore, Director, Multilateral Cooperation, Ministry of Trade and Finance, Burkina Faso
Mr. Jean-Luc Le Bideau, Professor, Université Paris I, France
Mr. Sheldon McDonald, Special Advisor, Attorney General's Department, Jamaica
Ms. Magda Shahin, Deputy Assistant Minister, Head of International Economic Affairs, Egypt

Resource persons

Mr. A.A. Fatouros, Professor, University of Athens, Greece
Mr. P. Muchlinski, Professor, Queen Mary and Westfied College, University of London, United Kingdom
Mr. Stephen Vasciannie, Professor, University of West Indies, Kingston, Jamaica

Specially Invited

Ms. Lise Weis, Senior Expert, Energy Charter Secretariat, Belgium
Ms. Marlies Filbri, Researcher, Centre for Research on Multinational Corporations, SOMO